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NO. 86-655

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

HARRIET M. GOULD,

Petitioner,

v.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Respondent,

and

ROBERT L. ISRAEL, et. ux. and
C. WILLIAM BAILEY, et. ux.,

Defendants.

PETITIONER'S REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY TO MONY'S BRIEF

Need to Examine the Record:

MONY's Brief not only refuses to identify the non-diverse defendants (Israel and Bailey) on page i but argues on page 6 that they were never parties to this action. No statute grants federal subject matter jurisdiction in this case, therefore if federal jurisdiction exists, it must rest on the complaint alleging complete diversity between plaintiff and all defendants. To prove to this Court that the complaint removed to the District Court did not allege the requisite complete diversity, the clerk of the Circuit Court has been requested to certify the record to this Court pursuant to Rule 19. That clerk refuses to comply with Rule 19 of this Court.[1] However, petitioner's allegation of joint liability of diverse and non-diverse defendants in a single non-severable cause of action is

[1] See copies of correspondence in the files of the clerk of this Court.

documented in the Court of Appeals' opinion as well as the Washington Appellate Court opinion[2] reversing the dismissal of the non-diverse defendants. The summary of the allegations of the complaint in both those opinions show that the complete diversity between plaintiff and all defendants required by §1332(a) and 1441(b) is lacking. Since diversity to support federal jurisdiction cannot be created by waiver nor by the refusal of both the Circuit and District Courts to consider the lack of federal jurisdiction, the judgment under this direct attack is void.

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[2] 37 Wn.App. 756, 638 P.2d 207 (1984)

Reply to Rule 17 Argument:

As will be pointed out herein, the Writ should be granted for one or both of the following Rule 17 reasons:

(a) The Federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

(b) The Federal Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court.

The Change of Posture Theory is not Supported by the Record:

There has been no change in the posture of this case since it was filed in the state court.

Posture at time of Removal:

Plaintiff had perfected her appeal from the state court dismissal on the merits of the non-diverse defendants to the state Court of Appeals. Under the decisions of this

Court such posture did not create the complete diversity required to support federal jurisdiction.[3] The Court of Appeals admits that the District Court should have remanded for lack of federal jurisdiction.

Posture at Time of Judgment:

No change. Plaintiff's appeal to the state Court of Appeals was still pending. Under the decisions of this Court in footnote 3 an appeal from the dismissal would not be necessary to prevent removal for want of jurisdiction.

Posture at Time of Argument to Court of Appeals on First Appeal:

No change.

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[3] Whitcomb v. Smithson, 175 U.S. 635, 637; 20 S.Ct. 248, 48 L.Ed. 203; Kansas City Suburban Belt Ry. Co. v. Herman, 187 U.S. 65, 23 S.Ct. 24, 47 L.Ed. 76; Alabama Great Southern Ry. Co. v. Thompson, 200 U.S. 206, 26 S.Ct. 161, 50 L.Ed. 441; Lathrop v. Int. Const. & Imp. Co., 215 U.S. 246, 30 S.Ct. 76; 54 L.Ed. 177; Great Northern Ry. Co. v. Alexander, 246 U.S. 276, 38 S.Ct. 237, 62 L.Ed. 13; American Car & Foundry Co. v. Kettelhake, 236 U.S. 311, 35 S.Ct. 335, 59 L.Ed. 594.

Posture at Time Court of Appeals Rendered Its Opinion on First Appeal:

State Court of Appeals had reversed the dismissal of the non-diverse defendants. The Court of Appeals was notified of that decision over a month before rendering its decision.[4] Plaintiff then had a valid suit against the non-diverse defendants in the state court, but due to the unlawful and unusual removal of the diverse defendant, cannot proceed against that defendant. Likewise, plaintiff could not collaterally attack the federal court judgment in the state court to avoid the doctrines of collateral estoppel and res judicata. The only relief available to plaintiff is a direct attack, as presented by this case, to set aside the void federal court judgment.

[4] Court of Appeals failed to give the state Court of Appeals' decision full faith and credit.

Posture Today:

No change. Plaintiff has not voluntarily dismissed the non-diverse defendants. The judgment in the federal court is therefore void for want of jurisdiction.

The Court of Appeals justifies its results by calling its dereliction of duty to search the record for federal jurisdiction[5] in the first appeal the "law of the case". If that theory is the law, then no Rule 60 independent suit could ever prevail, as every unlawful action of the Court theretofore would be the law of the case. In effect, the Court of Appeals has repealed Rule 60.

These points prove the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision and has decided a federal question in con-

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[5] All federal courts have been required to sua sponte search the record for federal jurisdiction at least since Mansfield v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884), over 100 years ago.

flict with the applicable decisions of this Court. The Writ should be granted.

RESPECTFULLY SUBMITTED,

Dated: 11/17/86

/s/ Vaughn E. Evans

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